

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

EDWIN V. BERRY, )  
 ) C.A. No. K10A-08-007 JTV  
 Appellant, )  
 )  
 v. )  
 )  
 UNEMPLOYMENT INSURANCE )  
 APPEAL BOARD and HALLS )  
 FAMILY RESTAURANT, )  
 )  
 Appellee. )

*Submitted: April 1, 2011*

*Decided: July 27, 2011*

Edwin V. Berry, *Pro Se*.

Katisha D. Fortune, Esq., Department of Justice, Wilmington, Delaware. Attorney for the Appellee Unemployment Insurance Appeal Board.

*Upon Consideration of Appellant's  
Appeal From Decision of the  
Unemployment Insurance Appeal Board*

**AFFIRMED**

**VAUGHN, President Judge**

***Berry v. UIAB, et al.***  
C.A. No. K10A-08-007 JTV  
July 27, 2011

**ORDER**

Upon consideration of both parties' briefs and the record of the case, it appears that:

1. Edwin Berry, the appellant, was employed as a dishwasher and line cook at Hall's Family Restaurant, the appellee, from September 4, 2008 through May 22, 2010. The appellant was discharged on May 22, 2010 because he refused to carry out a directive given by the owner of the restaurant. An Appeals Referee determined that the appellant was disqualified from receiving unemployment benefits. The Unemployment Insurance Appeal Board denied the appellant's application for further review because his appeal was filed in an untimely manner and affirmed the decision below.

2. The Appeals Referee found that the appellant was insubordinate when he failed to clean two stoves after being asked to do so by the owner of Hall's Family Restaurant. She concluded that such overt insubordination constituted willful and wanton conduct. According to the Appeals Referee, the appellant refused to carry out a reasonable and legitimate directive.

3. The appellant was three days late filing an appeal to the Board. The Board, in response, declined to accept the late appeal. In doing so, the Board stated that notice and instructions on how to appeal were properly given to the appellant. The Board held that: "[t]he appellate jurisdiction of the Board, like that of any court, rests on perfecting the appeal within the period of limitations fixed by law; if not filed

***Berry v. UIAB, et al.***

C.A. No. K10A-08-007 JTV

July 27, 2011

on a timely basis, the reviewing body must dismiss for lack of jurisdiction.”<sup>1</sup>

4. The limited function of this Court in reviewing an appeal from the Board is to determine whether the Board’s decision is supported by substantial evidence and free from legal error.<sup>2</sup> The appellate court does not weigh the evidence, determine questions of credibility of the witnesses, the weight to be given to their testimony, and the inferences to be drawn from them.<sup>3</sup> The court merely determines if the evidence is legally adequate to support the agency’s factual findings.<sup>4</sup>

5. This Court has jurisdiction to determine whether or not the Board abused its discretion by deciding not to hear the appellant’s appeal.<sup>5</sup> Under Delaware law, a decision of the Appeals Referee affirming, modifying or reversing a decision of the claims deputy becomes final “unless within 10 days after the date of notification of mailing of such decision further appeal is initiated pursuant to §3220 of this title.”<sup>6</sup> The Board in its discretion may hear an untimely appeal if “there has been some administrative error on the part of the Department of Labor which deprived the claimant of the opportunity to file a timely appeal, or in those cases where the interest

---

<sup>1</sup> *Berry v. Halls Family Rest.*, No. 40146825 (U.I.A.B. June 29, 2010)(citing *Wilson v. Masten Lumber*, 1993 WL 590326 (Del. Super. 1993)).

<sup>2</sup> *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 899 (Del. 1994); *Battista v. Chrysler Corp.*, 517 A.2d 295, 297 (Del. Super. 1986).

<sup>3</sup> *Behr v. Unemployment Ins. Appeal Bd.*, 1995 WL 109026 (Del. Super. 1995).

<sup>4</sup> 29 *Del. C.* § 10142(d).

<sup>5</sup> *Finocchiaro v. Panco Mgmt.*, 2006 WL 278402, at \*2 (Del. Super. Feb. 3, 2006).

<sup>6</sup> 19 *Del. C.* § 3318(c); 19 *Del. C.* §3220.

***Berry v. UIAB, et al.***

C.A. No. K10A-08-007 JTV

July 27, 2011

of justice would not be served by inaction.”<sup>7</sup> A late appeal, however, “may only be excused in extraordinary circumstances.”<sup>8</sup>

6. The appellant’s failure to file a timely appeal, or present evidence which would excuse its lateness, demands that the Board’s decision be affirmed. The undisputed facts are that the Appeals Referee’s decision was mailed to the appellant’s last address of record, and was not returned as undeliverable. The Appeals Referee’s decision gave notice of the appellant’s right to appeal, and the deadline to do so. Yet, the appellant failed to file a timely appeal. The Board concluded that appellant had adequate notice and an opportunity to be heard in satisfaction of due process requirements, and, as such, the appeal was found to be untimely. The appellant’s opening brief does nothing more than recite the arguments as to why he was allegedly fired without just cause, and fails to address why his appeal was untimely. Therefore, there is no evidence of administrative error or extraordinary circumstances. I conclude that the Board did not abuse its discretion in denying to hear the appeal.

7. For the aforementioned reasons, the decision below is ***affirmed***.

**IT IS SO ORDERED.**

/s/ James T. Vaughn, Jr.

President Judge

oc: Prothonotary  
cc: Order Distribution  
File

---

<sup>7</sup> 19 Del. C. § 3318 (c).

<sup>8</sup> *Bailey v. MBNA Am. Bank*, 1991 WL 1304159, at \*2 (Del. Super. 1991).